FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 14 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 58

GENERAL W. W. EAGLES, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

v.

UNITED STATES *ex rel.* HARRY HOROWITZ

No. 59

GENERAL W. W. EAGLES, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

v.

UNITED STATES, *ex rel.*, JACOB S. SAMUELS

BRIEF FOR RESPONDENTS

MEYER KREEGER,
Attorney for Respondents.

INDEX

	PAGE
Statement	1
Questions Presented	3
POINT I—The "Panel", the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the Panel through its members, its recommendation and the communication of the same to the Local Board were each and all illegal and without any warrant in law	3
POINT II—The conduct, actions and operation of the Panel and of City Selective Service Headquarters with respect thereto are in violation of the fundamental rules of law and justice	11
POINT III—Consideration of any matter not communicated to the registrant is in absolute violation of the statute	17
POINT IV—The actions and conduct of City Headquarters and/or the panel were coercive and registrant's 1A reclassification does not represent the local board's own decision	21
POINT V—Minor discrepancies should be disregarded. The background of the record as a whole did not justify the 1A reclassification	31
POINT VI—An appeal taken to and decision by an appeal board does not preclude a review of the classification	34
POINT VII—The names appearing under Appendix C of the government's brief, purporting to be those of panel members should not be considered	35
POINT VIII—U. S. ex rel. Goodman v. Hearn and other cases relied upon by the Government do not follow the recognized rules of law and are not controlling	37
The Samuels Case	44
The Cause is moot	46a
Conclusion	47

Cases:

PAGE

Downey v. United States, 91 Fed. (2d) 233 39

Interstate Commerce Commission v. Louisville & Nashville R. R., 277 U. S. 88 ..... 20, 38

Sullivan v. Swatzka, 148 Fed. (2d) 965 43

U. S. ex rel. Goodman v. Hearn, 153 Fed. (2d) 186 ..... 24, 37, 39, 40, 41

U. S. ex rel. Goodstein v. Mallon, 61 Fed. Supp. 671 43

U. S. ex rel. Harris v. Ross, 146 Fed. (2d) 355 ..... 37, 39, 40, 43

U. S. ex rel. Isseroff v. Cain (D. C., Eastern Dist., Misc. 888) 5, 12, 13, 41

U. S. ex rel. Levy v. Cain, 149 Fed. (2d) 338 ..... 7, 11, 15, 19, 29, 30, 40, 42, 45

U. S. ex rel. Rubin v. McGruder, 59 Fed. Supp. 947 ..... 4, 44

U. S. ex rel. Trainin v. Cain, 144 Fed. (2d) 944 ..... 42, 43

U. S. ex rel. Yaroslawitz v. Fales, 51 Fed. Supp. 960 43

Young Len Gee v. Nagle, 53 Fed. (2d) 448 32

Statutes Involved:

Selective Service & Training Act of 1940:

Regulation—632.1 (d) 5

Sections—603.1 10
605.32 17
623.2 20
627.13 (b) 35
623.2 38

Local Board Memorandum No. 187
Sections—1 and 2 5

PAGE

Carr v. Zaja, 283 U. S. 252 ..... 46c

Innes v. Crystal, 319 U. S. 755; 63 S. Ct. 1164 ..... 46a

Johnson v. Hoy, 227 U. S. 245, 33 S. Ct. 240 ..... 46d

Tornello v. Hudspeth, 318 U. S. 792; 63 S. Ct. 990 ..... 46b

Van Meter v. Sanford, 99 Fed. (2d) 511 ..... 46d

Weber v. Squire, 315 U. S. 810; 62 S. Ct. 800 ..... 46b

Zimmerman v. Walker, 319 U. S. 744; 63 S. Ct. 1027 .. 46b

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 58

GENERAL W. W. EAGLES, Post Commanding Officer,
Fort Dix, New Jersey,

Petitioner,

v.

UNITED STATES *ex rel.* HARRY HOROWITZ

No. 59

GENERAL W. W. EAGLES, Post Commanding Officer,
Fort Dix, New Jersey,

Petitioner,

v.

UNITED STATES, *ex rel.*, JACOB S. SAMUELS

BRIEF FOR RESPONDENTS

Statement

On the 2nd day of November 1941, Local Board No. 104 in New York City classified the respondent Horowitz

IV-D (student preparing for the ministry) under the Selective Training and Service Act of 1940, and he retained such classification for more nearly three years thereafter. Following the *recommendation* of a "Panel on Theological Classifications" the local board on May 11 and again on August 10, 1944, changed such classification to 1A, and respondent was thereafter inducted into the armed forces of the United States on February 15, 1945. He was sent to Camp Dix in the State of New Jersey, and a review of such classification and induction was sought through writ of habeas corpus issued out of the United States District Court for the District of New Jersey. After a hearing thereon before Honorable Thomas F. Meaney, U. S. D. J., on April 16, 1945, said writ was ordered dismissed on May 14, 1945.

On appeal from said determination, the United States Circuit Court of Appeals for the Third District reversed the lower Court and on November 15, 1945, ordered the writ sustained (151 Fed. (2d) 801). On application of the government to this Honorable Court a writ of certiorari was granted, and an order was filed thereon on May 27th, 1946.

Though the actual facts in the Samuels case naturally differ from those in the Horowitz case, they are, with one exception that will be particularly referred to herein, similar insofar as the pertinent questions on this appeal are concerned.

In addition to some of the facts which were before the local board, petitioner has made a number of references,—(1) which are nowhere contained in the record; (2) were not before the local board; (3) of which the respondent had and could have no knowledge, and (4) none of which is even supported by any authority other than alleged information received by the writer of the said brief. Further, pertinent and vital matters affecting

the said "panel" though contained in the record, have been completely omitted.

To avoid repetition these matters will be referred to and discussed later in this brief.

Questions Presented

At page 25 of its brief the government states that "the City Director found it desirable to establish the Theological Panel". There is no evidence in the record on this subject but for the purpose of this appeal it may be assumed to be the fact.

The language of the "question presented" at page 2 of said brief might indicate that the only question before this Honorable Court is whether or not recommendations made by the said panel are proper. However, one of the major issues presented is the propriety and legality of the creation of the panel itself, and as set forth under its argument in the said brief, at page 22,—"whether there is legal foundation for the establishment in New York City of an Advisory Panel on Theological Classifications".

POINT I

The "Panel", the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the Panel through its members, its recommendation and the communication of the same to the Local Board were each and all illegal and without any warrant in law.

The Local Board had classified the registrant IV-D which classification he retained for close to three years. City Selective Service Headquarters then requested that

his local board file be forwarded to it and the same was turned over to the panel, and the registrant ordered to appear before it, to be there examined. The examination having taken place, Selective Service Headquarters transmitted the file and a transcript of the examination to the Local Board together with a recommendation "that registrant's status did not warrant his classification in Class IV-D". (Letter in file dated May 10, 1944.)

We have been unable to find either in the Selective Training and Service Act of 1940 or in the rules and regulations promulgated in connection therewith any authority for the creation of a panel of this nature.

It appears from the opinion in *U. S. ex rel. Rubin* v. *McGruder etc.*, 55 F. Supp. 947, that

> "Lt. Colonel Durham testified that there was nothing in the Act providing for a theological panel or authorizing such a body as was used in the instant case; *that it exists only in New York* and was created by New York Headquarters to assist boards and advise them in cases involving divinity students." (Italics ours.)

There is nothing to indicate who created the panel, how it was chosen, the number of its members, who they are or who its chairman may be, if any; who, or how many sit on a case, whether a quorum is required, what the vote may be, unanimous or otherwise, and other elements too numerous to mention.

Selective Service Headquarters does not even permit the names of those present or the names of the person or persons who conducted the examination to appear on the transcript. And the transcript is not even signed by a member or anyone else.

They give no reasons for their decisions, no basis for their opinions, and sign their names to nothing.

All we know is that it carries the impressive and dignified title of "Advisory Panel on Theological Classifications."

May we adopt the language of a comment made by Hon. GROVER M. MOSCOWITZ, *U. S. D. J.*, in a similar case (*U. S. ex rel. Isseroff* v. *Cain, etc.*, Misc. 888) at a hearing before him months *after* the panel proceedings in this case:

> "If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method."

Again, search as one will, and no authority can be found to justify the registrant's appearance before and examination by any person or body other than the Local Draft Board and/or its members.

Section 632.1 of the Selective Training and Service Act regulations, subdivision (b) thereof, provides:

> "It is the Local Board's responsibility to decide in the first instance the class in which each registrant shall be placed."

And there is an express direction with respect to divinity students covering this question, specifically provided for in Local Board Memorandum 187. Section 1, subdivisions a and b, sets forth the requirements necessary for a IV-D classification. Section 2 provides:

> "LOCAL BOARD TO MAKE DETERMINATIONS: The Local Board is charged with the *primary* responsibility of determining whether a registrant * * * fulfill(s) the above requirements of the Act and Regulations." (Italics ours.)

We, of course, recognize that officially it will be claimed that the Local Board decided "in the first instance" the

class in which the registrant was placed, but let us examine what in practice really occurred.

Local Boards were created for the purpose of handling the cases of registrants within their respective immediate areas. Through the medium of appeal boards, applications to Selective Service City Headquarters and appeals to the President, the machinery was set up whereby a registrant who felt that he had been unjustly dealt with by the Local Board or the Appeal Board could apply for relief to those higher in authority. Having this in mind, it is clear why the regulation just referred to provided that the Local Board should make its *own* decision "in the first instance."

The Local Board's 1-A classification in the case at bar was only made *after* the receipt of the recommendation of the panel, which, apparently, was created by City Selective Service Headquarters or its director. The recommendation was received by the Local Board on May 11th, 1944 and the Local Board classified the registrant 1-A *on the same day.*

A court of last resort makes a "recommendation" to one of lower authority regarding a *decision* which the latter is about to render. The decision is made immediately thereafter and follows the recommendation made. How useless, how futile becomes an appeal from that decision to the authority upon whose recommendation the decision was based,—the *only* authority to which a *final* appeal may be taken?

By the creation of this panel and giving it the authority to examine the registrant, to be followed by a finding which the highest authority, the City Director, transmits to the Local Board,—the very purpose of the regulation is defeated.

We are mindful of the fact, that the chief of the Legal Division, New York City Headquarters closed his com-

munication of May 10th with:

> "Of course, while the Local Board should give careful consideration to the recommendations of the Advisory Panel, formal determination of the registrant's classification must rest with the Board itself or the appropriate appeal agency."

But we also realize that discretion is still the better part of valor. It seems inconceivable that the lay members of the Local Board would do other than follow the "recommendation" of its superior officers at City Selective Service Headquarters, the latter having received the said recommendation from *its own* "advisory panel on theological classifications composed of eminent clergymen and laymen", all of which the writer took pains to incorporate in the said communication. It will appear herein and the record now shows that *no* clergyman "eminent" or otherwise, was even present.

Repeated efforts were made by the registrants to restore the IV-D classification but to no avail. What else could have been expected from the *final* appeal authority which had recommended the classification complained of!

With the exception of certain elements which will be particularly referred to herein the situation here is analogous to that which existed in the Levy case. At pages 24 and 25 of his brief in the United States Circuit Court of Appeals for the Second Circuit, Levy, referring to the "Statement", submitted that there were "two pages of gratuitous opinions, statements and arguments, each and all of them highly prejudicial, without even a suggestion offered to support them, and without a scintilla of evidence in the file of any kind upon which they may be based.

"So we now find that Selective Service Headquarters (in New York City alone) not only has an advisory panel

which makes recommendations, but it has an official connected with it, whose duty it seems, is to interpret those recommendations, and having interpreted them, to communicate the same to the Local Board.

"Not even a careful scrutiny will disclose the name of Knowlton Durham among those regarded as authorities on Orthodox Jewish religion, tradition, customs and its institutions; still, as far as this case is concerned, the contents of this communication is all that the government offered on those subjects." (Colonel Durham had signed the Statement.)

Comparisons are oft times odious,—and the writer hopes that this Honorable Court will not deem him presumptuous if he suggests that the procedure followed in this case would be comparable to that of a trial court which, having a case before it, had delivered to it in advance of its own decision, the opinion of an appellate tribunal with respect to its merits.

The Solicitor General constantly attempts to justify the creation of the Panel by referring to the Board which hears cases of conscientious objectors; in fact he devotes a large part of his brief to that effort. For the same purpose he refers to "Industrial Advisors", "County War Boards", "War Industries Board" and numerous others.

In every instance these boards were created by express statutory authority and their duties and limitations were clearly provided for.

The Solicitor General recognizes the well defined distinction which exists,—does so by his naive suggestion at page 36 of his brief where he states that "Apart from the fact that the theological panel was created by the City Director rather than directly by Congress, we perceive no basis for distinguishing between the conscientious objector cases and these cases." That should be sufficient.

At page 37, the Government in a footnote states that provisions of the *Conscientious Objector Statute* "embody a compromise plan worked out between representatives of various religious organizations", etc. In view of the fact that no plan was "worked out", etc., with respect to the panel, much less any statutory authority for its "provisions" the *carefully worded* footnote at page 45 of the Government's brief is worthy of attention. It there appears that "we are advised by the Selective Service System", "that the members • • • of the panel",—*not the panel,* its creation, procedure, the acts of the City Director and others at headquarters in connection therewith,—but the "members have received the endorsement" of various Jewish religious organizations.

In a further effort to justify the creation of the panel, the government at page 39 attempts to draw an analogy between it and "industrial advisors to the district boards" in the first World War. As appears at page 64 of said brief this was done pursuant to section 80 of the Selective Service Regulations. It was specifically provided that "there shall be appointed by each District Board three persons to be known as industrial advisors to the district board. • • • Such advisors shall have the right to furnish all pertinent information to the district board", etc.

In addition to the fact that "industrial advisors" acted pursuant to statutory authority only, and the "panel" does not, it was provided that the former "shall have and exercise only the rights, duties, powers, and functions herein specifically given"; that they acted only *"upon request of the board to which they are attached"*, and the "information • • • will supplement the information in the possession of the district boards", etc. (Our italics.)

City Headquarters did not direct their activities, interpret their actions, request the reopening and reconsideration of registrants' classifications following such

actions, send letters to the District Boards regarding the same and there was nothing concealed or secret about their work. They were not authorized to present any arguments pro or con, confidential or otherwise and performed *only* the duties specifically prescribed by the statute. (See Points II and III.)

The list of agencies referred to at pages 39 and 40 of his brief should suffice to convince him of the legal distinction present. One of them was created as late as January 2, 1946. "Attacks on the panel" (this brief, p. 13), its propriety and legality have been made in the Courts for a number of years now, and the United States Circuit Courts of Appeals for the Second and Third Circuits have declared acts of the panel unauthorized and illegal. As each of said agencies was created, so could a "Theological Panel" be authorized if Congress or the authorities at Washington thought it advisable and proper. Regulations with respect to dentists and other professional men have been incorporated in the Selective Service Law and its regulations, and that is the only reason why such boards and/or agencies are recognized as such and are permitted to function.

At page 39 we find another unwarranted statement purporting to show why the "Director of Selective Service did not formally authorize the creation of the panel". In the absence of, and inability to find a better excuse, it is sought to justify the panel because of the "Jewish problem" in New York City. Chicago has gone through the war without the aid of a panel, and so has Philadelphia, Detroit, St. Louis, Boston and numerous other large cities.

Section 603.1 of the regulations provides that the *National Director* of Selective Service "is responsible to the president" and is authorized and directed among other things "(a) to prescribe such amendments to these regu-

lations as he shall deem necessary." If the panel is so important to the City Director, just *why has he not attempted to have it authorized?*

See *U. S. ex rel. Levy* v. *Cain*, 149 Fed. 2d 338, and the opinion below. The authorities will be referred to in detail under the Points following.

POINT II

The conduct, actions and operation of the Panel and of City Selective Service Headquarters with respect thereto are in violation of the fundamental rules of law and justice.

At page 45 of its brief, the government urges "• • • there is nothing secret about the panel. Indeed, an administrative purpose to conceal the identity of its members, which is what respondents seem to argue, is hardly compatible with the plain purpose of the panel."

That appears to be a strong argument in support of the proposition that there should be *no* secrecy with respect to the panel activities and that there should be *no* concealment regarding the identity of its members.

In at least a dozen instances, and covering many pages of said brief, we find that if the respondents "desired to know the names of the persons" (panel members) • • • "they need only have asked"; that "information is available to any registrant who takes the pains to request it" (B. p. 21); the "information • • • would have been readily available to them if they had sought it" (B. p. 23); • • • "if inquiry had been made the information would have been forthcoming" (B. p. 43). • • • "there is nothing secret about the panel" (B. p. 45); and "Respondents • • • failure to do so" (request names of panel of members) "suggests that the point which they now make is a mere afterthought" (B. p. 46).

These statements are not only unjustified but represent absolute misstatements of the facts themselves; and in proving them as such, we feel convinced that the Solicitor General and the attorneys associated with him in Washington were not informed by New York City Selective Service Headquarters of the true facts, and were not aware of them.

Unfortunately the actual record herein omits much of the discussion, colloquy and argument which took place at, and on the hearing of the writ. Further, the writer will not offer any information not contained in the record, for which reason he will not recount the numerous conversations which he had with responsible authorities at New York City Selective Service Headquarters with respect to this subject matter. Fortunately however, contained in the files of the United States District Court for the Eastern District of New York is indisputable proof of the falsity of the premises sought to be urged by the government herein.

Under date of *May 2nd, 1944,* following registrant's appearance before and examination by the panel, an "extensive report" *supposedly authored by the panel,* was sent by City Headquarters to the local board which purports to set forth the panel's *"conclusion that registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law".*

This "extensive report" not only fails to disclose the signature of the panel as a whole or any member thereof, *but is in fact unsigned.*

Four months *after* the last mentioned date, at a time when the panel had completed its work with respect to these respondents, we find that in *United States of America ex rel. Isseroff* v. *Cain, Commanding Officer, etc.,* that the identical questions here at issue were before

the Court on a writ of habeas corpus. The papers in that case are on file in the office of the Clerk of the United States District Court for the Eastern District of New York and are marked with the Clerk's Official designation, M-888.

An examination of that record will show that on the hearing of the writ which took place on September 6, 1944, the following statement was made by Mr. Parker representing the United States Attorney:

> "• • • in the past—this is about the fifth case we have had—there have been attacks upon the Panel. *The Government in the past did not wish to disclose the names of the members of these panels, but, on account of the attacks,—*
>
> The Court: I don't see any point to it. *If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method.* You have no objection to it, yourself?
>
> Mr. Parker: Well it has come to that pass that I think I should take that step." (Italics ours.) (Stenographer's Minutes, p. 7.)

It might be well to call to the attention of this Honorable Court that though these cases were inaugurated in different Court jurisdictions all three originated in New York City *by reason of the actions of the same authority,*—New York City Selective Service Headquarters. Up to the time of the Isseroff case, inductees were sent to Camp Upton, Long Island, which is within the jurisdiction of the United States District Court, Eastern District. Shortly thereafter they, including these respondents, were sent to Fort Dix, New Jersey, which is within the jurisdiction of the United States District Court for the District of New Jersey.

In an effort to bolster its position and add color to its claims that the "information is available to any registrant

who takes the pains to request it", etc., we find, at page 12 of the government's brief that "On February 12th, 1945, New York City Headquarters wrote to the appeal board and also to the local board, a letter containing among other things, the names of those who were present at the hearing", etc.

First,—it will be seen that this was "for your information", *i.e.*, the local boards. Second,—let us look at the date on which the names were sent,—February 12, 1945,—ten months *after* the panel examination, and nine months *after* the local board's receipt of the alleged report thereon.

Upon receipt of the Panel "recommendation" from City Headquarters, on May 11th, 1944, the local board changed respondent's classification from IV-D to 1A, *on the same day.* That again, was nine months *before* this "name" letter was written, and the file shows numerous efforts made by the respondent during those nine months to have his IV-D classification reinstated.

With every step taken and every administrative remedy exhausted by the respondent, he received his notice of induction. *With the case closed,* City Headquarters *then,* and only three days before his actual induction, on February 15th, 1945, mailed for the first time, these names "for your" (the board's) "information". The attention of the Court is most respectfully referred to the fact that this was over five months *after* the Isseroff case,—after it was admitted in open court that in the past "the government • • • did not wish to disclose the names of the members of these panels" etc.

Now let us next examine the "transcript of testimony" taken before the panel. Does it bear or indicate the names of those present? No. It does not even disclose the name of the panel member who conducted the examination!

In *United States ex rel. Levy* v. *Cain*, 149 Fed. (2d) 338, at pp. 341-342, the United States Circuit Court of Appeals for the Second Circuit said:

> "It seems to us fundamental to any fair trial that, like all other witnesses, their identity must be disclosed to the person whose liberty their testimony is to affect. Unless he knows who they are, it is impossible for him to show what biases or predilections may move them, or whether they have that acquaintance with the subject which alone makes their testimony competent at all. Furthermore, their anonymity relieves them of the important sanction of publicity which guarantees their impartiality and solicitude, just as publicity guarantees the impartiality and solicitude of the tribunal itself. Nor is there any conceivable excuse for concealment that we can see, unless it be to shield the 'panel' from a criticism, which, if they are to be fit for their task at all, they should be sturdy enough to withstand."

The government, at page 46 of its brief, undoubtedly recognizing the force of these truths attempts to evade it by suggesting: "Apart from the fact that the panel scheme rests in part upon the community's recognition of the high caliber of its membership, there is little likelihood that the identity of persons as prominent in the religious public life of New York City as are the members of the panel could be concealed even if such a purpose be assumed."

Not only is it a fact that the names *were* successfully "concealed" but the record shows *conclusively* that it was their desire to have them so "concealed". At page 8, the government sets forth in its brief part of the "report" sent by City Headquarters to the local Board following registrant's said appearance before and examination by the panel. It is there referred to and captioned as a "statement for the record".

Though the governm. nt insists "that there is nothing secret about the panel",—when this Honorable Court reaches that exhibit it will find that not only were the names kept secret, but vital subject matter as well; that the word "CONFIDENTIAL" precedes the word "statement", and that the caption on the said exhibit actually reads:

"ADVISORY PANEL ON THEOLOGICAL CLASSIFICATIONS
CONFIDENTIAL STATEMENT FOR THE RECORD"

It is a far cry from the government's assertion that "the panel scheme rests in part upon the community's recognition of the high caliber of its membership" etc. to one which discloses that the panel conducts its hearings in anonymity; its conclusions and the reasons therefor, based on fact or otherwise, are unsigned, its recommendations unauthored, *and the local board is directed to keep the same "confidential" in its entirety.*

In substance, the members of the panel make a "recommendation" that the registrant's status be changed from IV-D to 1A, and accompanies it with pages of *argument* why such change should be made; they refuse to disclose their identity *even to the local board,* and then *direct* the local board *to withhold the alleged reasons and arguments contained therein from the "community", including the registrant.*

No,—the only thing that they did not wish to do was to inform the registrant, much less the community, of the nature or details of their activities.

The writer has been attorney or counsel in a dozen of these matters, and despite the fact that "there have been attacks upon the panel" etc. (p. 13 of this brief) there has not been a single instance in which a member of the panel has ever appeared in an effort to justify the "statement for the record" "confidential" or otherwise.

Being "confidential" the registrant never saw it until *after* he was actually inducted, *and then only,* if a writ were obtained, and his file brought into Court.

POINT III

Consideration of any matter not communicated to the registrant is in absolute violation of the statute.

Even the Solicitor General subscribes to *this* proposition for at page 41 of his brief he submits that "So long as the information * * * is placed in the file, *where the registrant may examine it and reply to it,* we think it is immaterial" where the information is obtained (italics ours).

It seems needless to further comment on the government's omission of the word "confidential" in its reference to the "Statement for the Record". With that fact established, it is most respectfully submitted that the said "statement" sent to and received by the local board constituted a violation of Regulation 605.32 of the Selective Training and Service Act of 1940 which provides that

> "No information shall be confidential as to * * * (1) the registrant, or any person having written authority from the registrant."

This "confidential" statement reads like an animated argument against the registrant concluding with what might well be termed an order to the local board to change his classification to 1A.

The file *now* discloses, properly or improperly, that three members of the local judiciary constituted the panel.* It would seem hard to believe that even laymen would transmit such a communication to the local board and request that information with respect thereto should

---

* Though the communication of May 10th sent to the local board stated that the panel which recommended that registrant's status does not warrant "4D classification was composed of *eminent clergymen* and laymen", it was not until the case was closed and then only three days before actual induction that headquarters wrote the local board that "* * * none of the panel's rabbinical members were present at the hearing in question" etc.. (Letter of February 12, 1945.)

not be communicated to the person affected. It seems inconceivable that men trained in the law and elevated to judicial position could write unsigned pages filled with highly prejudicial matter and vital to the interests of the person affected,—practically ordering that the local board change its own decision,—and caption the same "confidential".

Quasi judicial in its nature, duties and functions, the local board is presented with a powerful, forceful document containing arguments with respect to alleged historical and religious tradition, unsupported by any authority or evidence, for the sole purpose of having that body change its decision, and carrying with it the admonition not to inform the registrant of the reasons for the change.

Without any attempt at "flag waving" this procedure bears a striking resemblance to some of the practices indulged in by our recent enemies.

Time and again the government refers to statements of or by the panel, and at page 8, particularly refers to the "Statement for the Record", dated May 2, 1944, which had been "prepared by the advisory panel" (the "confidential" statements). There is no evidence or even a suggestion either in the testimony taken at the court hearing or contained in the file to support this statement. All that the record shows is that though the letter is dated May 2nd it was not sent before or with the letter of May 10th (letter with recommendation), but was sent on June 5th *after* Rabbi Schorr's IV-D recommendation. The date May 2nd was not an arbitrary one. *That was the date of the panel hearing,* and though mailed over a month later, that date might readily give color (to the local board at least) to the suggestion, if not the thought, that it was prepared *by the panel* on the date of the hearing.

We have no way of knowing whether or not the panel is really responsible for the form and language of the

communication itself. The records of our Courts will show, that with the exception of the particular facts relating to this registrant, letters, almost identical in language, were sent in the past in all similar cases. For instance in *U. S. ex rel. Levy* v. *Cain, supra,* the letter was *sent and signed* as were the others, by "Knowlton Durham, Chief Legal Division" (Record, Levy case, pp. 111-113). The main difference in *language* is that Levy's "attendance at the academy in question was prompted by extraneous considerations." In the instant cases the "registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law."

In the Levy case the communication was *not* marked confidential and the opinions and statements therein were *not* attributed to the panel.

At pages 7 and 8 of this brief we submitted to this Honorable Court *part* of the criticism of these practices, presented to the United States Circuit Court of Appeals for the Second Circuit, in the Levy case

This followed earlier court "attacks on the panel", and, after that there were *no more* letters signed by the Chief of the Legal Bureau, and from then on, they bore *no* signature at all. However identical statements have since been attributed *to the panel,* but marked "confidential."

We think it quite significant that at no time, in any of the cases in which the writer has appeared, has a single witness, panel member or other, been produced by the government in support of any statement, opinion or argument contained in the "confidential statement for the record."

In addition to its being "confidential" the local board was *directed* that "the statement should be added to the registrant's file *and considered* together with the other information of record *in determining the registrant's*

classification" (our italics), despite the fact that

> "No information shall be confidential as to * * * the registrant" etc.

Is it possible that the eminent gentlemen who were members of this panel, as well as the Chief of the Legal Division at City Headquarters, did not know that they were violating the provisions of this regulation? And when they sent this "confidential" communication "to be considered * * * in determining the registrant's classification", did they not know that they were also violating Section 623.2 of the Selective Service Regulations which provides

> "* * * *Under no circumstances* should the Local Board rely upon information received by a member personally unless such information is reduced to writing and placed in the file"? (Italics ours.)

We know that it was "reduced to writing and placed in the file". But we also know, that once there, the statute provided that the registrant was entitled to see, read and examine it, and that it was a violation of the law to withhold it from him. Irrespective of the express provisions with respect thereto, and granting that they did not know of them, it seems incredible that three members of the judiciary and the Chief of the Legal Division would not know that such procedure violated the cardinal, fundamental and underlying principles of justice.

It seems inconceivable that they would not realize, as was said in *Interstate Commerce Commission* v. *Louisville and Nashville Railroad*, 227 U. S. 88, at page 93, that:

> "* * * Manifestly there is *no* hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or

refute. * * * for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained* on the theory that the commission had before it *extraneous, unknown* but presumptively sufficient information to support the finding." (Italics ours.)

POINT IV

The actions and conduct of City Headquarters and/or the panel were coercive and registrant's 1A reclassification does not represent the local board's own decision.

As has been pointed out, classification of a registrant is the responsibility of the local board; and, with respect to divinity students, a *special* provision makes it the primary responsibility of the local board to determine whether or not a registrant fulfills the requirements of the Act.

On May 10th, 1944, *eight days after* the date of the "confidential statement', Selective Service Headquarters mailed to the local board a copy of the "transcript of evidence" taken before the panel and a letter stating that it had "voted to recommend that registrant's status did not warrant his classification in Class IV-D". *On the very day of its receipt,* May 11th, 1944, the Local Board reclassified the registrant 1A.

Requesting a hearing thereon pursuant to the provisions of the statute, the entire case and file were referred *by the Local Board* to Rabbi Henry A. Schorr, the most prominent and outstanding rabbi in Bronx County,—in which County the local board is located,—for an "advisory recommendation". After a study of the case and a personal examination of the registrant, he recommended a IV-D classification and the local board so reclassified him on *June 1st, 1944* (R. 27, 28).

Let us keep in mind that for three years the local board did not feel that it needed any advice in the matter and that in the first instance, the file was sent to, and the panel proceedings, etc., were had at the City Selective Service Headquarters *at the request of the latter.**

Two months after Rabbi Schorr's recommendation, *August 10, 1944*, registrant received a "notice to come down to the board * * * and was told I would be put in 1A" (R. 28).

Pages seven to twelve of the government's brief are devoted entirely to the printing of the letter containing the "panel recommendation" and "a statement for the record" (p. 8) which now appears as the "Confidential Statement for the Record". Then follows what purports to be a history of the proceedings down to the time of induction. Immediately following its reference to the IV-D classification of June 1, 1944 recommended by Rabbi Schorr, the government refers to a local board hearing as a result of which "Horowitz was again classified 1A" (pp. 11-12). No mention is made of anything that occured in the meantime or *what brought about the final 1A reclassification.*

The fact is that between those two dates the Chief of the Legal Division at City Headquarters wrote two very important letters to the Local Board, neither of which is referred to at this or *at any time by the government.*

Learning of the IV-D classification *of June 1st*, the Chief of the Legal Division *on June 5th* immediately

---

As early as July 31, 1943 the City Director had sent a bulletin to the local board regarding the panel to the effect that it " * * may submit *doubtful* cases to this headquarters for advisory opinions by the panel". This bulletin also applied "* * * to cases *already classified in which there has been some question of doubt*" (Government Brief, p. 27) (our italics).

wrote the local board,—"enclosed herewith is a copy of the Confidential Statement for the Record of the appropriate division of our Advisory Panel on Theological Classifications in the above matter".

The recommendation of May 10th, 1944 had brought about the desired result forthwith. *When the local board's own choice of a rabbi* resulted in the IV-D classification, the "Confidential" statement was deemed immediately necessary; and City Headquarters again obtained the registrant's local board file "for further administrative review", undoubtedly with respect to Rabbi Schorr's "advisory recommendation".

Not finding anything to actively complain of in that respect, the Chief of the Legal Division on *July 29th, 1944*, wrote to the local board: "Enclosed herewith, is a communication from the College of the City of New York indicating that in 1936 the registrant stated that his vocational preferences were '(1) rabbinate (2) teaching' and in 1937 it was (1) teacher (2) rabbi." The letter closes with:

> "In view of the importance of the question of intention in the present case (see our letter of June 5th) it is requested that the Local Board reopen and reconsider the registrant's classification of June 1st in the light of the additional information presented and advise this headquarters of the action taken in the matter."

"Our letter of June 5th" was the one which contained the "Confidential Statement for the Record". It was following the receipt of *this* letter that the Local Board again changed the classification from IV-D to 1A.

The July 29th letter was the subject matter of a significant incident which occurred *at the hearing on the writ.* Counsel sought to refer to the same to show that the

change in classification from IV-D to 1A followed a "request" by City Headquarters that "the Local Board reopen and reconsider the registrant's classification of June 1st", and at the same time requested the local board to refer to the "confidential" statement.

He requested production of the same and the United States Attorney in answer to a question by the Court stated "I don't remember seeing a letter to that effect, sir, in the file". The Court then ordered a recess for three minutes to "see if you can find it" (R. 33). The recess, and an entire page of colloquy between Court and counsel, failed to produce the letter. Registrant had made a copy of the same from the file at the local board prior to the time of his induction (this letter was not marked "Confidential") and counsel started to read it. It was only then, that the U. S. Attorney announced "Mr. Agress had it when I asked if there was such a letter" (R. 33, 34).

Who is this Mr. Agress that he could have this letter in his pocket, whereas registrant's counsel was only permitted to see the file "under the supervision of Lieutenant Lathrop who did not move from my side" (R. 35). The answer may shed considerable light on many unanswered questions in this case, as well as the fact that on occasion, documents favorable to a registrant do not even reach his file until after final classification by the local board.

Though the printed record herein is barren in this respect, again, fortunately, there is an official Court Record which furnishes the answer. In *United States of America ex rel. Goodman* v. *Hearn, etc.*, a similar question was involved and the Transcript of Record in that case was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit on the 26th day of October, 1945. The writ had been

heard at Macon, Georgia. The page references following are to the said Transcript of Record:

At the opening of the case, counsel for the government stated that he had a witness from New York who would arrive shortly (R. 32), and the court was later informed that "he is with the Selective Service Board" (R. 114). Having "just come in" government counsel felt it necessary "to talk with him before we go into the cross examination" of the registrant (R. 74), and, it later appeared, that his name was "Mr. Agress * * * who is now in Court" (R. 108).

When he was not called, the writer, at the close of the testimony, asked government counsel "You are not going to use the man from New York?" he replied, "No, sir, you can use him if you want to * * *" (R. 114).

The record shows that when it was necessary to obtain any information about the panel, Mr. Agress was the man to see; when it was sought to ascertain why important communications from the seminary had ("through inadvertence") not been sent to the Local Board, Mr. Agress was the man to see; and though not a member of the Panel he was present ("at the session") (R. 72, 73, 74, 108, 109).

"You can use him if you want to" was not accepted, as the writer felt that he was entitled at least, to the latitude enjoyed by the examiner at the panel hearings where,—who wrote certain letters, statements and opinions, and why,—could be inquired into; where the *accuracy* of their contents could be examined, and inquiry made as to whether or not there was any proper basis or support for the same; why *prior* to the writer's appearance in the matter the said statement (on the first hearing) was marked "confidential" but subsequent thereto, and after the second hearing, they were not so marked; what his functions are with respect to both the panel

and the legal bureau; *and why the seminary letter transcript and recommendation were "inadvertently withheld from the local board prior to the classification of January 30, 1945"* (Gov. Brief, p. 39). Having been present at the Panel hearing (R. 108) he could have given *evidence* as to the "registrant's demeanor" (R. 183, 184) with respect to which the record is absolutely barren; and, perhaps, the reasons why and upon whose advice that appellant was the last or one of the last to be inducted on that day, and given orders to leave the jurisdiction of the Court within thirty-five minutes, so that it was finally necessary to obtain the writ in Georgia instead of New York City (Goodman reply brief, pp. 82, 83).

Knowing Agress, we did not accept the offer because we also knew that if we called him we would be *bound* by *any* answers he might give, and that if they did not square with the facts, any effort at further examination with respect thereto would be met by the objection that we could not impeach our "own witness".

The record of course, does not show *who* changed the U. S. Attorney's mind about calling him as a witness, after being brought from New York City for that purpose.

The communications in that case which were "inadvertently withheld" (Gov. brief, p. 39) and did not reach the local board until *after* the registrant was finally classified and about to be inducted, consisted of a letter from Samuel L. Sar, Dean of the Rabbi Isaac Elchanan Theological Seminary, "the leading orthodox rabbinical seminary in the western hemisphere" (R. 191); the transcript of an examination of the registrant conducted by him, Rabbi Soloveitchik, Senior Professor of Rabbinics at, and Dr. Samuel Belkin, President of, the Seminary; and a "decision" which "unanimously recommended to the Panel on Theological Students for a classification of 4D", which was signed by all three.

At the time of the hearing herein, with respect to the July 29th letter there was nothing to indicate what might have motivated the Board in again reclassifying the registrant, and particularly there was nothing to indicate that immediately before so doing the Board was "requested" to reopen and reconsider the IV-D classification and in so doing to refer to the "Confidential Statement for the Record". It seems passing strange that this important letter could not be found until produced from Mr. Agress's pocket. Without any severe stretch of imagination we are impelled to think of some of the unanswered questions in this case, such as why the names of the panel members do not appear on the transcript, and why the examiner's name particularly does not appear thereon; why almost identical "statements for the record" were originally signed by the Chief of the Legal Bureau, and after criticism in and by the courts these statements were then unsigned; why, since they have been sent unsigned they have been attributed to the panel,—and finally wh they then became "confidential".

At the hearing on the instant writ it appears at R. 28 that in a conversation with members of the local board registrant was personally "told that while these people would have been satisfied to keep me in 4-D classification, they had had continual notices from headquarters concerning me and they didn't want to have any more discussions about it, and they decided to put me in 1-A"; and at R. 33 "they would have been satisfied to accept their opinion which they gave as a result of Rabbi Schorr's letter, but that they had received a communication from headquarters which was forcing them to do otherwise".

Is it not fair to assume that if the last 1-A classification was the result of the considered judgment of the local board or its members that the government would have had at least one of them at the hearing to so testify?

Is it not fair to assume that if the local board and its members had not told the registrant that they wanted him to retain the IV-D classification, that "they had continual notices from headquarters" and they had received a communication from headquarters which was forcing them to do otherwise,"—that the government,—surely Agress, would have had one of them in Court to deny such testimony?

In the *Goodman* case at Macon, Georgia, Agress informed the United States Attorney that the members of that board could not be present because "we attempted to have the board members here, or some of the members, but they are in Court in Chicago" (R. 114). After all, Newark, where the instant hearing was held, is but a few miles from New York.

Conveniently overlooking the fact that the panel was not named by the local board, that its members were not known to it, that they did not live in the community and did not act on the "initiative" of the local board, the government, at page 41 of its brief, submits that "in many instances *as in the Horowitz case* the classifying boards have on their initiative invited advisory recommendations from persons in the community who are specially qualified to assist the boards" (our italics).

Yes, but what happens when it does, and a IV-D "advisory recommendation" is received as a result thereof, and the local board follows *that* recommendation? The Chief of the Legal Bureau at City Headquarters *immediately* sends the local board a voluminous document filled with unsupported statements, prejudicial matter and suggestive innuendo, marks it "confidential", follows with another "requesting" the board to "reopen and reconsider" the IV-D classification, and in so doing, to refer to the "confidential" statement.

We stated at the outset that the government's brief contained statements not in the record. One of these is

at page 27, and is most decidedly unfair, because it refers to records which are not available to the respondent or counsel. They are in the exclusive possession of New York City Selective Service Headquarters. The Solicitor General states that he is "advised by the Selective Service System * * * that as of December, 1945, the Section of the Panel involved in the present cases had recommended in favor of registrant's claim to exemption in approximately 65% of the cases". There is not a word of testimony in the record to this effect and not a suggestion contained in the file as to the subject matter.

There is however documentary evidence in the file of the United States Circuit Court of Appeals for the Second Circuit and in those of the United States District Court for the Eastern District of New York which tends, in cases of Orthodox Jewish registrants, to brand this information furnished to the Solicitor General as unfounded as that furnished to him regarding the panel, its members and the "secrecy" with respect to their names and to the alleged panel "confidential" communications.

In *United States of America ex rel. Levy* v. *Cain, supra,* it appears from the record at page 101 that the registrant in reviewing his case wrote to the Board of Appeal, and among other things submitted:

> "It is about time this Board realized that where a Panel has passed upon fifty students from one seminary all of whom are bona fide students and out of that fifty have recommended a 4-D classification to only one it cannot be said that each case has been examined upon its own merits and a just, fair, and impartial decision rendered.
>
> "Merely because Jewry is divided into three separate and distinct classes, Orthodox, Conservative, and Reformed is no reason why the Conservative and Reformed Jewry should be preferred over the Orthodox

Jewry, and students of these Seminaries be preferred to students of the Orthodox seminaries."

These paragraphs are referred to in full in the opinion reversing the lower court and sustaining the writ (149 Fed. [2d] 338, at 340).

Through this letter was written and placed in that registrant's file in March, 1944, and was offered and received in evidence at the hearing of the writ *two months later* neither the person who furnished the present information to the Solicitor General, a member of the panel, a representative from City Selective Service Headquarters or anyone else ever dared deny the truth of that charge, and we use the word charge advisedly.

At page 47, and at other times throughout its brief, the government urges that the local and appeal boards "*merely* considered an advisory recommendation" (our italics). But is that all that was considered?

On May 10th the "advisory recommendation" was sent to the local board *accompanied by a request* that the original IV-D classification be reopened and reconsidered.

On June 5th, pages of material earlier referred to and described herein were mailed to the local board "*to be considered* • • • in determining the registrant's classification"—and this after the board had again classified the registrant IV-D. In "determining the registrant's classification" the Local Board was informed *anonymously* to "consider" that the panel allegedly had reached the "conclusion that the registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law". Is this too "merely an advisory recommendation"? And on July 29th does the request to "reopen and reconsider the classification of June 1st" (IV-D), and in so doing to consider the "confidential

statement" indicate "merely an advisory recommendation"? Surely the language and import thereof did not suggest a reopening and reconsideration for the purpose of again reaching a IV-D classification.

In the light of the above and similar situations contained in the file it seems fantastic to read that the local board exercised "an independent judgment in classifying the registrant" and that "formal determination of the registrant's classification must rest with the board itself or the appropriate appeal agency" (Government brief, pp. 23, 8).

POINT V.

Minor discrepancies should be disregarded. The background of the record as a whole did not justify the 1A reclassification.

As to the discrepancies upon which the Government relies to sustain the action of the Local Board, the entire background and the record as a whole is disregarded. In addition to a mass of certificates, etc. as to current activities, documentary evidence in the form of a graduation album shows that as far back as 1932, upon completion of his public school studies Horowitz had stated that his ambition in life was to be a rabbi. Upon his graduation from high school in 1936, the official year book of the DeWitt Clinton High School shows that his first vocational choice was the "rabbinate". The record in the Selective Service file is replete with evidence indicating that he was not only interested but actually engaged in continuous religious activities, engaged in compensatory activities only as a means of obtaining funds to fulfill his ambition to become a rabbi,—in some of which he acted as a cantor and for a year or more as an assistant to the Rabbi of his congregation.

Going back to the completion of his high school studies, he entered the College of the City of New York in 1936,

at which time he expressed his vocational choice as "(1) rabbi, (2) teacher" and the following year it appears that the order was reversed and records indicate that he placed "teacher" first and "rabbi" second.

After his IV-D classification of June 1st, 1944, the Chief of the Legal Bureau of City Selective Service Headquarters on July 29th wrote the Local Board calling attention to this fact *and this fact alone* stating that "In view of the importance of the question of intention in the present case (see our letter of June 5th), it is requested that the local board reopen and reconsider the registrant's classification of June 1st in the light of the additional information presented and advise this Headquarters of the action taken in the matter".

The June 5th letter contained the "Confidential" statement. Immediately following the July 29th letter, the Local Board changed the classification to 1A and it is that particular classification that is involved on this appeal.

As was said in *Young Len Gee* v. *Nagle*, 53 Fed. 2nd 448, at 449, where it appears that "to overcome the burden of proof established by the appellant, the government relies upon three discrepancies":

> "* * * The Board of Special Inquiry and the Secretary of Labor denied admission to the applicant on the ground that he had failed affirmatively to establish the claimed relationship to Young Ng., *and their decision was based on the development of certain discrepancies.* In order to determine whether the order of exclusion was arbitrary, we must first examine the background *of the record as a whole.*" (Our italics.)

And at page 450:

> *"It is not that we are substituting our judgment on the admitted evidence for that of the Board;* it is rather that the weight of evidence in support of the

> claimed relationship is so strong, and is supported by those imponderables of which the Board may take cognizance, that any failure to recognize the claimed relationship is a *purely capricious and arbitrary action on the part of the Board.*" (Our italics.)

The Board in that case was specifically authorized and created by statute,—not one, as here, for which there is no legal authority for its existence,—despite which it assumes authority and functions not sanctioned by law.

As we have just pointed out, the July 29th letter stated "In view of the importance of the *question of intention* in the present case", etc. In this connection may we refer to the opinion expressed by District Judge Meaney who in dismissing the writ said:

> "*I don't care about his actual intention,* because I am not going into that • • •. I am willing to admit • • • that it (local board) did show indecision • • • the board was uncertain, it finally did arrive at a determination." (Our italics.)

As to the merits, the first statement is highly significant because under the statute and the decisions the "*intention*" of the registrant *is of primary importance.* As to the local board's decision being "final", this conclusion has been unanimously rejected by the courts.

As to the "indecision" and "uncertainty" shown by the local board,—the above recital indicates clearly what brought it about. Each time that it had made up its mind that the registrant was entitled to a IV-D classification its mind was changed by communications, etc. from the Chief of the Legal Division at New York City Headquarters.

We fully realize that as far as the written evidence is concerned, it does not appear that City Selective Service

Headquarters literally asked the Board to "change" its decision, nor did it, in language, "order" a change of the decision. Much has been said by the government to the effect that the final decision was left to the Local Board, but in each instance the written word shows opinions, arguments and innuendo presented, followed by a "request" to reopen and reconsider the classification. The words may not have been used, but the desire was expressed and the order naturally implied therefrom.

POINT VI

An appeal taken to and decision by an appeal board does not preclude a review of the classification.

It has been previously urged as is here *suggested* at page 30 of the government's brief that a decision by the appeal board, precludes review of a classification made by the Local Board. The cases are unanimous in holding that as a condition for the issuance of a writ of habeas corpus under the Selective Service Law the registrant must exhaust all of his "administrative remedies".

If the government's contention were correct, a registrant who did not appeal to the Appeal Board could not obtain a writ of habeas corpus because he had not exhausted his "administrative remedies". If he does exhaust his "administrative remedies" by taking such appeal, the decision thereon would result in the classification being "final" and not reviewable by the courts,—a result which this and other courts have repudiated—but one which the government has sought to obtain.

Irrespective of the propriety of the consideration of the "confidential" statement for the record by the Local Board, it was in violation of the Selective Service Law for the same to have been contained in the file sent to the Appeal Board.

Section 627.13, subdivision (b) thereof, provides for a summary which the local board is to prepare in conjunction with forwarding the registrant's file to the said Appeal Board. The last sentence of that section provides:

> "In preparing such a summary, the local board should be careful to avoid the expression of *any opinion* concerning information in the registrant's file and should refrain from including *any argument* in support of its decision." (Our italics.)

The same fundamental rules of law with respect to so-called "Confidential" communications which apply to the local board apply equally of course to the appeal board. Even though the statement were not a confidential one and had been open and available to the registrant, it contained "opinion concerning information in the registrant's file" and "arguments in support of its decision". In addition letters from the Chief of the Legal Division to the local board which were in the file strongly expressed the opinion that there were "inconsistencies" in the registrant's papers,—and together with other opinions and arguments, the board was "requested" to reopen and reconsider the IV-D classification of the registrant.

POINT VII

The names appearing under Appendix C of the government's brief, purporting to be those of panel members should not be considered.

No such list was in the registrant's file, respondent had no knowledge of the same; it was not produced in Court, is not contained in the record herein, and, we most respectively suggest, it should not, for these reasons, be considered on this appeal. The writer fully realizes that there are a number of prominent names in the list and

appreciates the import of the descriptive material employed in connection therewith.

How many are or ever were active members of the panel does not appear. Whether or not the activities of the panel were presided over by only two or three "regulars" does not appear. Not one of them ever signed his name to a recommendation in these cases; every one of them wanted his name kept secret; not one has appeared in Court in any of these cases to uphold or justify the recommendation made, opinions expressed or argument urged, though challenged in open Court to do so,—and that *if* responsible for the "Confidential Statement for the Record" *their failure and refusal* to sign the same and their violation of the statute in permitting it to be marked "Confidential" should, at least, make much less valuable the importance which might ordinarily attach to their names and positions.

The reason for the appendix seems clear. Fighting for years to keep their names "concealed" and employing every means available to City Selective Service Headquarters and government attorneys to do so; reacting to the rebuke of a United States District Court Judge,—"If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method."; successfully hiding in anonymity while the war was on,—and now that the war is over for more than a year, we find their names disclosed for the first time. And it would be interesting to know if, at long last, they really gave their consent to the use of their names, or whether the informant of the Solicitor General just supplied them.

After all, the list of names for the entire panel was never too important. It was the names of the two, three or more who sat on individual cases which was. That was *never* possible to obtain, and we feel certain that this

unauthorized, unwarranted and belated action in now furnishing the alleged entire list will not serve the purpose sought to be achieved by the government.

POINT VIII

U. S. ex rel. Goodman v. _Hearn_ and other cases relied upon by the Government do not follow the recognized rules of law and are not controlling.

The Government throughout its brief refers to and urges *United States ex rel. Goodman* v. *Hearn*, 153 Fed. (2d) 186 (Fifth Circuit) as an authority for its contentions and conclusions. The Learned Court which decided that case had very shortly before rendered a decision and wrote an opinion in the case of *Harris* v. *Ross*, 146 Fed. (2d) 355. On the hearing of the writ as well as on the appeal to the Circuit Court in the *Goodman* case, the *Harris* case was most strongly urged as authority by the Government to sustain the dismissal of the writ by the lower Court. It was there held that the inductee failed "to carry the burden of proof to support his claim before the Local Board" because "The Local Board is not a court that must swear witnesses, allow representation by counsel, and act only on the evidence presented" (p. 358). The opinion then recites that:

> "* * * The Local Board had the power and duty to determine from the evidence in the record, from proofs produced, *and from the extrinsic facts within the knowledge of the board, whether in evidence or not. In the absence of such facts as were within the knowledge of the board, but which are not in the record here,* this Court would be in no position to review the decision of the board on the facts even if the Court had the right to review actions which are committed to the discretion of the board." (Our italics.)

In commenting thereon, Goodman in his brief urged:

"We most respectfully further submit that if this be so, then *every* decision of a local board could be held to be absolutely final, without the right of review by the court, because the same situation could be said to prevail with respect to the members of every local board. * * * If the decision of the local board may be based upon 'knowledge or facts in the possession of its members but which are not in evidence' how would it ever be possible for a court to determine that a 'board' acted in a 'capricious manner', etc.?"

"Section 623.2 of the regulations provides:

'Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. *Under no circumstances should the Local Board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.*'" (Our italics.)

"Let us eliminate this regulation, and again appellee's complaint regarding the absence of United States Supreme Court authorities may be further minimized by reference to *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, where, at page 93, it was held:

'* * * Manifestly there is *no hearing* when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.'

'* * * The Commission *is not limited by the strict rules as to the admissibility of evidence*, which prevail in suits between private parties. * * * But the more *liberal* the practice in admitting tes-

timony, *the more imperative* the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners *cannot act upon their own information as could jurors in primitive days.* • • • In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained* on the theory that the commission had before it *extraneous, unknown* but presumptively sufficient information to support the finding.'" (Our italics.)

"In *Downey* v. *United States,* 91 Fed. (2d) 223, the Court following *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* said at page 231:

'The law puts no premium upon form for form's sake, but upon form as a safeguard to fair and dependable hearing and review, it properly lays great weight.'

And in following Interstate Commerce Commission v. Louisville & N. R. R., supra 'where, speaking through Mr. Justice Lamar, the court, *though recognizing that the Commission—unlike a Court—is not limited to the strict rules of evidence* • • • forbade the Commissioners to 'act upon their own information as could jurors in primitive days.'"

There were a number of other authorities also submitted.

Whatever the reasons therefor, suffice it to say that when the decision in the *Goodman* case affirmed that of the lower Court, *the Harris case was not even mentioned.* In part, the opinion practically adopts the view that the registrant having been given a hearing and the rules and procedure having been followed, that the decision

is final; and it directly rejects the decision of *United States ex rel. Levy* v. *Cain* (Second Circuit), *supra*, and those of the Third Circuit in the instant cases, without offering any basic legal reasons therefor. Many of the important reasons and grounds for the appeal urged by the registrant were not passed upon or even mentioned.

The opinion does not even seek to justify the creation of the panel as does the Government herein, by urging that it was proper to do so "under rules" and regulations prescribed by the President", etc. (Gov. Brief, p. 22). It appears that the learned Court was content to dispose of that question by admitting that though it is "not authorized by statute or regulation", it "*seems* to have been set up by Selective Service Headquarters for New York City, to give the local boards * * * advice, etc." (p. 220).

We most respectfully submit that this is no answer to the questions involved. Irrespective of its purposes, and assuming that they are as well intentioned as suggested in the opinion, the question still remains,—Was there any authority for the creation and operation of the Panel itself?,—a Panel governed by no rules, having unlimited powers and indulging in practices, as the evidence here indicates, in violation of some of the fundamental principles of law and justice.

It seems clear that its own very recent decision in *Harris* v. *Ross*, upon which the government "rested so heavily" and which permitted "the local board" to classify registrants on "*such facts as were within the knowledge of the board but which are not in the record here*", was abandoned because of its conflict with the decisions of this Honorable Court which were submitted by Goodman; and its opinion in the *Goodman* case, while not so clearly and glaringly erroneous, has no foundation in law or in fact and does not even cite one authority to support it.

As for its holding, as the government states at page 43, of its brief, "that if inquiry had been made" (for names of the panel members) "the information would have been forthcoming", that has been effectively and conclusively disposed of at pages 11-17 of this brief.

At page 31 of its brief, the government states:

> "We agree with the Circuit Court of Appeals for the Fifth Circuit (*United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186 (writ of certiorari dismissed pursuant to stipulation)), that this fact by itself does not permit the conclusion that the boards of appeal abdicated their statutory function."

This statement might indicate that the merits of the question were involved. The fact is that the motion for a writ of certiorari was granted and while the appeal was being prepared to this Court it developed that Goodman was about to be discharged from the army. If discharged, the question would have become moot, and it was for this reason, and *for this reason alone* that the government and registrant's counsel entered into the stipulation referred to.

In the *Isseroff* case, also urged by the government, the names of the panel members were *first* made known *at the hearing on the writ of habeas corpus.* The opinion in that case was in large part based upon the fact that the word "final" in the statute did not permit decisions of the local board to be reviewed by the courts. It was in that case that the statement was made that the government in the past was most desirous of *not* disclosing the names of the panel members.

An appeal in that case was taken to the United States Circuit Court of Appeals for the Second Circuit, but there too, the registrant was to be discharged from the army before the appeal could be heard and the appeal was withdrawn by stipulation.

The government repeatedly refers to *Trainin* v. *Coin*, 144 Fed. (2d) 944, suggesting that its holding is contrary to that in the Levy case. First of all, both cases were decided by the same Court (Second Circuit) and the Levy case was *subsequent* in point of time to the Trainin case. The real question in the former was whether or not there was *substantial* evidence to justify the 1A classification.

At page 947 of the Trainin opinion, it appears that "there was ample justification for the board's action". Among other elements, it appeared that when Trainin first registered for Selective Service he was a student at Brooklyn College. "Although shortly thereafter he entered St. John's Law School, * * * he stated in his selective service questionnaire in July, 1941, that he was a regular and duly ordained rabbi of the Hebrew Orthodox faith." He was placed in class IV-D. He *continued* the study of law until January, 1943; took and passed his Bar examination, and served as a clerk in a law office. As a result of anonymous complaints an investigation followed and he was reclassified 1A. He had "never attended any seminary in order to become a rabbi". In his questionnaire he swore that he was ordained "on June 1, 1938, and had commenced rabbinical practices around January 1, 1939". "He presented to his local board two certificates of ordination" both dated "June, 1940". In his occupational questionnaire he stated that he had been a rabbi since March, 1937", but before the panel "he stated that he had been ordained and had become a rabbi only in April, 1940". He then "returned to Selective Service Headquarters and presented a third certificate of ordination, issued under date of June, 1939, by his father." There seems to be no need to go further. The Court at page 949 said:

> "* * * what testimony and proof he did offer * * * was fairly well discredited upon cross examination. Further, most of his interest seems to have been in

the law, not the rabbinate. * * * Relator does not make out a very savory case; his story about the date of his ordination shifted with virtually each occasion that he was called upon to give it; and whenever his chances of exemption began to look a little dark, he seemed able to produce a new certificate of ordination that he 'had forgotten all about'."

The Government also urged the *Trainin* case in its brief on the Levy appeal, and we submit a portion of the reference made by the appellant Levy with respect thereto, and as contained in his brief, in support of his contention that no *actual holding* had been made supporting the restrictive rule (decision of Local Board is final) urged by the government:

"* * * this Honorable Court, after referring to the rules and standards applied in different authorities, stated that the question remains 'not thoroughly settled' and seemed *inclined* toward the view,—*though we most respectfully submit it was not so directly held*,—of applying 'the test of whether the Local Board had any evidence before it to sustain its result'" (Levy Brief, p. 20).

The opinion which followed in the Levy case and in the decisions of the courts below in this case negated the government's contentions.

In the *Goodstein* case, urged by the government, among other things, the Chairman of the local board actually appeared and testified. In the *Yarsolowitz* case,—*Harris* v. *Ross* was relied upon, and in the *Sullivan* case it appeared that there was a regulation which provided:

"Use of boards and information in their possession—Local Boards should utilize the services of the United States Department of Agriculture, County War Boards, in securing necessary current information as to agricultural activities of registrants."

There is not a single authority cited in the Government's brief which supports the contentions of the Government.

The language of the lower court in *U. S. ex rel. Rubin v. McGrader, supra,* might well be applied here:

> "The travel of this case indicates that the local board had a difficult decision to make and I am convinced that the local board was undoubtedly influenced by the advisory opinion of the theological panel."

In its Findings the Court stated that the registrant's

> "classification was made in the teeth of all the substantial evidence before the local board and the appeal board". and "the registrant's change of classification from 4D to 1A was an arbitrary, capricious and illegal act on the part of the local board".

The Samuels Case

As a question of law the *Samuels* case differs from the *Horowitz* case in that the "Statement for the Record" is not marked confidential. The record fails to show whether or not Samuels ever saw or knew the contents of the same. However, whether or not he did might be gleaned from the documentary evidence in his local board file.

After the 1A classification he sent a communication to the local board under date of October 4, 1944 in which, among other things, he stated:

> "The *transcript* from the panel contains so many errors. * * *" and "I have only recently had the opportunity to copy down the *transcript* * * *." (Italics ours.)

On his appeal from the 1A classification under date of October 23, 1944 he prepared a "Statement on Appeal".

In that statement there appears among other things:

> "There was a communication in the form of a letter from headquarters stating that the panel did not think I belonged in IV-D. I read in the file the *transcript* from the panel. There is absolutely nothing in there showing why the panel thought I don't belong in IV-D—but it does contain numerous errors and omissions. The local board * * * took the position that they follow the panel's recommendation."

Both of these communications refer solely to the transcript of the examination before the panel. He made a copy of that examination. There is absolutely no reference to the "statement for the record." Both of his statements urge that there was nothing new before the local board. If he saw or was permitted to read the statement for the record with its damaging, prejudicial and gratuitious opinions, is it not fair to assume that the "statement for the record" ~~was not in the file~~ would have remained to? Isn't it fair to assume that he was not afforded "the opportunity to copy down" the "statement for the record"?

Even the Government in its brief does not claim that he did, merely stating "that he examined the panel's *recommendation* and replied to it" (p. 29). (Italics ours.)

Whether or not he saw it, the opinions and arguments contained therein are similar (excepting the factual situation) to those contained in the *Horowitz* case.

Again every statement, opinion and argument contained in the "statement for the record" in the *Levy* case (Levy Record, pp. 111-113), is identical with that in the *Samuels* case. In the latter, however, there is *additional* argumentative material.

As to the facts, some of them are even more reprehensible. In the first place Samuels would have "completed his course for the rabbinate * * * in June, 1945"

(R. 42). "They told me to come down at a certain evening and when I came there with Rabbi Quinn, the Clerk notified me that they reconsidered it without my presence two days previous * * *. There was a letter of induction. That was their statement" (R. 48).

Even at the hearing on the writ all efforts to obtain the names of those who comprised the panel were to no avail even though the United States Attorney had "the Selective Service man next to" him (R. 51, 52).

"I was told by the local board at the hearing that the bringing of letters has no value whatsoever." (R. 47)

Incorporating herein the references heretofore made with respect to the failure of the government to call *any* witness with respect to the claims and contentions made by the registrant, the record here contains a statement affirmatively corroborating this last quoted testimony. In the registrant's local board file will be found a "local board memorandum" dated November 9th, 1944 in which Mr. White of the local board commenting on the written evidence submitted by the registrant stated:

> "* * * These letters * * * were received *more or less* as a courtesy."

The Union of Orthodox Rabbis of the United States and Canada is, as the name indicates, an international organization and recognized as the outstanding orthodox body of its kind. Its committee had examined Samuels and found him to be a qualified rabbinical student intending in good faith to become a rabbi and so recommended.

The same Mr. White continues in the said memorandum to state that he felt that the Selective Service panel was "unbiased" and that the Union of Orthodox Rabbis of the United States and Canada was not.

It also appears that the final decision of the local board was by a divided vote,—2 to 1.

The Appeal should be dismissed as the cause is moot.

After the decisions of the Circuit Court herein, orders were entered in the District Court with respect to the status and disposition of each inductee. It was provided therein that they be discharged and *released from custody* without prejudice to further lawful proceedings under the Selective Service Act; but in the Horowitz case, it was further ordered that such release be conditioned upon his furnishing " * * * the amount of Five Hundred ($500.00) Dollars, for his appearance to answer and abide by the judgment in any appellate proceeding that may be instituted by the respondent in this cause." Such provision is not present in the order releasing Samuels, it being there

> "ORDERED that the said General Madison Pierson or any other Commanding Officer at Ft. Dix, New Jersey or any other Commanding Officer at any station or installation of the United States Armed Forces within the District of New Jersey, or wherever situate, or wherever the said *Jacob S. Samuels* is now held in custody or any other officer, agent or representative of said Armed Forces, be and the same are hereby *ordered and directed to forthwith discharge the said Jacob S. Samuels, the relator herein from such custody,* and it is further
>
> ORDERED that the discharge of the relator from such custody is without prejudice to further lawful proceedings under the Selective Service Act in his case." (Our italics.)

In each case, the inductee was discharged and *released from the custody of the military authorities* subject only to new proceedings before his local Selective Service Board, which proceedings *might* again lead to his induction.

In *Innes* v. *Crystal*, 319 U. S. 755; 63 S. Ct. 1164, it appeared that the relator was removed from the custody of

the Army to a Federal Penitentiary in a different district and circuit. In *Weber* v. *Squire*, 315 U. S. 810; 62 S. Ct. 800; the petitioner had been released upon an order of the United States Board of Parole. In *Tornello* v. *Hudspeth*, 318 U. S. 792; 63 S. Ct. 990, the petitioner had been pardoned by the President. (See also *Zimmerman* v. *Walker*, 319 U. S. 744; 63 S. Ct. 1027.)

In each of these cases it was held that the person had been discharged and released from custody, and, not being in the lawful custody of anyone, the cause was moot.

The absence of the "recognizance" provision in the Samuels order was not due to any oversight. On April 11, 1946 Honorable J. Howard McGrath, Solicitor General, who appears for the Government herein, sent a letter to and which was received by the writer of this brief, part of which is as follows:

> "Re: Pearson v. U. S. ex rel. Samuels, No. 948, Supreme Court of the United States
>
> Dear Mr. Kreeger:
>
> This will acknowledge your letter of April 9 regarding the above-entitled case.
>
> I have looked into the matter and I find that, as you say, you were advised by the Assistant United States Attorney handling the appeal that the Government would not petition for a writ of certiorari to review the decision of the Circuit Court of Appeals; and that, relying upon that representation, you caused the mandate to be entered in the District Court with the approval of the United States Attorney. The result was that Samuels was released from military custody. Your position is that these facts foreclose the government from seeking Supreme Court review of the case, both on legal and moral grounds, and you suggest that the Government should not proceed further.

> While, of course, I regret that you were unintentionally misled as to the Government's position, I cannot agree that the facts which you present foreclose the United States from now petitioning the Supreme Court for certiorari to review the case. I am, therefore, unable to take action dropping the case."

The balance of the letter contains the reasons stated by the Solicitor General in support of the position taken by him and he refers to the case of *Carr* v. *Zaja*, 283 U. S. 252, as legal authority therefor.

Irrespective of the propriety of the reasons urged or the applicability of the authority referred to, they do not affect the legal question here involved. It is elementary that the basis for a writ of habeas corpus is the question of "custody". In the instant case the fact is, as the Solicitor General himself so aptly points out in his letter,—*"The result"* (of the signing and filing of the order) *"was that Samuels was released from military custody."*

No reason, "legal or moral", can change that fact, and it is most respectfully submitted that there is no question remaining which this Honorable Court is called upon to decide.

Horowitz' status.

The writer freely admits that absent the "recognizance" provision in the order releasing Horowitz from custody, the United States Attorney *might* not have consented to his release, but it does not follow that he would not have been otherwise released. If this consent order had not been signed and filed, the United States Attorney would have been compelled to apply to the Circuit Court for a stay which might or might not have been granted.

However, since then, he has read some of the decisions with respect to bail cases on writs of habeas corpus, and

in view of the similarity of the pertinent facts, he feels that he would be derelict in his duty, both to this Honorable Court and to his client, if he did not submit the same herein.

In *Johnson* v. *Hoy*, 227 U. S. 245, 33 S. Ct. 240, Johnson arrested under an indictment, applied for a writ of habeas corpus. After a hearing the same was dismissed. He was subsequently released on bail pending an appeal from that decision and the Court held at page 241:

> "Since the appeal, he has given bond in the district court, and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. * * * The appeal must be dismissed."

See also *Van Meter* v. *Sanford*, 99 Fed. (2d) 511, and cases there cited.

Though it is true that these authorities held the causes moot at the request of the Government on appeals taken by those who had been in custody, the same rule should apply here because the *sole* basis for these decisions is that "No one has his body in custody, or could lawfully arrest him by virtue of his parole status so long as he observes its conditions", and "* * * He has given bond in the district court, and has been released from arrest under the warrant issued on the indictment."

Neither Samuels or Horowitz is in the custody of anyone. Both are now in civilian clothes, attending classes at rabbinical seminaries in New York City, free to come and go as each may desire,—all of which is known to the Government, and information regarding which has been communicated to their local boards, and is undoubtedly contained in their respective files.

Conclusion

In addition to the illegality of the creation of the panel and the panel itself, its unauthorized and unwarranted acts, as well as those of City Selective Service Headquarters, in connection therewith—an examination of the background of the records as a whole discloses that both registrants were entitled to a IV-D classification.

Respectfully submitted,

MEYER KREEGER,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1946.

Major General W. W. Eagles, Post Commanding Officer, Fort Dix, New Jersey, Petitioner, v. United States ex rel. Harry Horowitz.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 23, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to *Eagles* v. *Samuels*, No. 59, decided this day, *ante* p. —. Certiorari also brings it here from the Third Circuit Court of Appeals. That court followed the same procedure here as it did in Samuels' case; it reversed the District Court which had dismissed the writ of *habeas corpus* brought on behalf of Horowitz, and remanded the cause to the District Court with directions to discharge him from military custody. 151 F. 2d 801.

It appears that after the remand Horowitz was enlarged upon a recognizance as permitted under our rules. Rule 45. The suggestion that the case is therefore moot is without merit for the reasons stated in Samuels' case.

Horowitz registered pursuant to the Selective Training and Service Act of 1940, as amended, early in 1941 and filed a questionnaire stating he was a college student preparing for a career as a psychiatric social worker. At the time he asked for a deferment in induction until February, 1943, saying that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." Shortly after he was physically examined and found qualified for military service, he advised the local board that he had been en-

rolled in the Rabbinical Seminary of America, a recognized theological school. On July 1, 1941, he was classified I–A. The board of appeal likewise gave him that classification in August, 1941.

Meanwhile, he claimed exemption under § 5 (d) of the Act. The basis of his claim was the representation that he was a student in a recognized theological school for rabbis and was preparing for the rabbinate. In an affidavit he stated that he had not disclosed his intention to become a rabbi because he had no "concrete facts" to present, only "hopes". In November, 1941, the local board classified him IV–D which classification he retained until May, 1944. In 1942 he filed an occupational questionnaire with the local board stating that he was taking a course in rabbinical studies at the seminary and also a bachelor of social science course at another institution which he hoped to complete in 1944. He listed himself as a social worker.

In April, 1944, the city director of Selective Service reviewed the file and requested Horowitz to appear before an advisory theological panel. He appeared before a panel and there was a hearing. The panel stated that all students in this seminary were not necessarily preparing for the ministry and that each individual case should be separately appraised.[1] It concluded that his attendance at the seminary had been motivated by a desire to secure a basis for exemption under the Act. This was based

[1] The approach of the panel to the question is shown as follows in its statement:

> "Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objective of those engaged in such study, and all courses offered by these academies are open to qualified students without regard to the individual student's specific intention to prepare for a career of service in the rabbinate.
>
> "Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate.

on his declared intention early in 1941 to be a social worker, inconsistencies in his explanation of his failure to refer to the rabbinate at that time, his indifferent and unsystematic manner in preparing for that professed objective, and an appraisal of his reliability and candor. The transcript of proceedings before the panel and later the report were transmitted to the local board by the office of the city director of Selective Service with a request to the board to reopen and reconsider his classification. The report made by the panel was not signed. Moreover, the report was headed "Confidential Statement for the Record." The local board was advised by the city director's office that while it should give careful consideration to the recommendation of the panel, determination of the classification must be made by the board itself or by an appeal agency.

Horowitz was immediately reclassified as I–A. He asked for a hearing which was granted. It appears that the panel which interviewed him and rendered the report was composed of three prominent Jewish laymen but no rabbi. Whether that was the cause does not appear, but the board, as a result of the hearing, referred the file to a rabbi for another advisory recommendation. The rabbi recommended that Horowitz be classified IV–D. The local board gave him that classification in June, 1944. In August, 1944, the local board held another hearing.

It is, therefore, essential for purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

"Moreover, the fact that the religious tradition in question does not attempt to distinguish between the serious student of talmudic literature and the student preparing for a professional career in the rabbinate, tends to make it extremely difficult for school officials, ministers, and others identified with that tradition, to have and express an objective judgment in such matters.

"To the extent that the distinction is understood, there is a tendency to accept at face value assertions made by the registrant and members of his family and to resolve any doubt in his favor, where it is at least apparent that he is a serious and pious talmudic student."

Horowitz was present and was examined. The board concluded that he should be in I–A and so classified him, stating as its reason that he became a student in the rabbinical school after he had registered under the Act. He requested and was granted another hearing, at which he submitted additional evidence. The local board refused to change the classification. On appeal the board of appeal classified him as I–A.

On two subsequent occasions Horowitz asked that his classification be reopened and submitted additional evidence. The board was unpersuaded and refused to reopen the classification. The office of the city director advised the boards that the panel which interviewed Horowitz had been composed solely of laymen and that if by virtue of that fact the board of appeal desired to reconsider the case, to inform the office. Both the local board and the board of appeal replied that there was no occasion for reopening the classification. The board of appeal stated that it had "once again unanimously agreed that the registrant's status does not warrant a IV–D classification." Early in 1945 Horowitz was inducted into the Army.

Horowitz relies upon affidavits and statements from various people concerning the *bona fides* of his professed desire to become a rabbi, on a statement made when he graduated from the public schools in 1932 that that was his ambition in life, on the fact that he stated in 1936 that his first vocational choice was the rabbinate, and on all of his subsequent activities which, he asserted, fitted into that pattern. On the other hand, it does appear that in 1937 his first vocational choice was teaching, his second the rabbinate. Furthermore, as already noted, his professed objective stated to the local board early in 1941 was social work. And he in fact entered the seminary shortly after he had passed his physical examination and qualified for military service. These circumstances alone

make his claim to exemption colorable. Certainly we cannot say that the action of the board of appeal in finally classifying him as I–A was without any support in the evidence.

The question remains whether there was anything in the administrative procedure which vitiated Horowitz' classification. What we have said about the use of a theological panel and the range of its inquiry in *Eagles* v. *Samuels, supra*, need not be repeated here. There is nothing in the present case which makes for a different result. We can no more conclude here, than in Samuels' case, that the board abdicated its function. It first followed the panel's recommendation. But its mind was not closed, as evidenced by the fact that it later sought the advice of a rabbi and followed his recommendation. And when it returned to its earlier position, it proceeded on the ground that the basic defect in Horowitz' case was the shift in his position in 1941 after he had registered. The record shows indecision by the board but no subservience to the panel. As respects the fact that the panel's report was unsigned, only a word need be added. Horowitz, like Samuels, appeared in person before the panel and saw its members face to face. At no time does it appear that he sought the identity of the members and was refused the information.

The essential procedural differences between this case and Samuels' are two—it appears that this panel was composed entirely of laymen; and its report was not only unsigned but marked confidential for the file. The first objection carries little weight. These laymen were prominent citizens of the Jewish faith. There is no showing that they were of a sect hostile to Horowitz. There is nothing to impeach their integrity or to suggest that they were not qualified to serve in the expert role assigned to them.

The fact that their report was marked confidential is given great emphasis. It is argued that although the use

of a theological panel may be authorized, there is no warrant for clothing its action in such secrecy.

The regulations, indeed, prescribe that no information in a registrant's file shall be confidential as to him or any one having written authority from him. Section 605.32 (a), 8 Fed. Reg. 2641, 9 Fed. Reg. 9190. But the difficulty here is that it is not shown that the panel's report was in fact treated as confidential by the local board. It is not shown that Horowitz sought and was denied access to the report. Nor is it shown that when Horowitz examined the file the report was not made available to him. If those were the facts, we do not doubt that Horowitz' counsel would have established them at the *habeas corpus* hearing. We find no command to the local board to keep the report confidential. We cannot presume that the board violated the regulations. Yet that is in effect what we are asked to hold. Horowitz, like Samuels, points to possibilities of abuse in the use of the panel. But like Samuels he fails to establish prejudice in his case. The judgment below must therefore be

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1946.

Major General W. W. Eagles, Post Commanding Officer, Fort Dix, New Jersey, Petitioner, *v.* United States ex rel. Jacob S. Samuels.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 23, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Samuels registered under the Selective Training and Service Act of 1940,[1] as amended, and thereafter claimed exemption from military service under § 5 (d) of the Act. That exemption includes not only regular or duly ordained ministers of religion but also "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior" to the Act. He was classified I–A and inducted into the Army. Thereafter he filed a petition for a writ of *habeas corpus* in the District Court, seeking release from military custody on the ground that he was entitled to an exemption under § 5 (d) of the Act and that his classification as I–A was unlawful. There was a return and a hearing, and the District Court ordered the writ dismissed. On appeal the Circuit Court of Appeals, in reliance on *United States v. Cain*, 149 F. 2d 338, reversed and remanded the cause to the District Court with directions to "discharge" Samuels "from military custody, without prejudice to further

[1] 54 Stat. 885, 55 Stat. 211, 621, 845, 56 Stat. 386, 50 U. S. C. App., 50 U. S. C. App. Supp. I, and 50 U. S. C. App. Supp. II, § 301 *et seq.* Our citations of the Act and the regulations throughout the opinion refer to the provisions applicable at the times relevant here.

lawful proceedings under the Selective Service Act". 151 F. 2d 801, 802.

The case is here on a petition for a writ of certiorari which we granted in order to resolve the conflict between the decision below and *United States* v. *Hearn*, 153 F. 2d 186, in the Fifth Circuit Court of Appeals.

First. A question of mootness lies at the threshold of the case presented here. We are advised that after remand of the cause the District Court ordered the release of Samuels and that he was thereupon unconditionally released from military custody. Samuels contends that the case is moot since he is no longer in custody of the military or of any one else but is free to come and go as he pleases.

Under our decisions the case would be moot if the writ of *habeas corpus* had been denied below and, pending disposition of the petition here, Samuels had received a discharge from the army. *Zimmerman* v. *Walker*, 319 U. S. 744. And see *Weber* v. *Squier*, 315 U. S. 810; *Tornello* v. *Hudspeth*, 318 U. S. 792. That situation, like the case of a prisoner who, pending an appeal from denial of a writ of *habeas corpus*, is granted bail, *Johnson* v. *Hoy*, 227 U. S. 245; *Wales* v. *Whitney*, 114 U. S. 564, 572-574, would present no existing controversy. *Habeas corpus* is the means of making a judicial "inquiry into the cause of restraint of liberty." R. S. § 752, 28 U. S. C. § 452. As stated in *McNally* v. *Hill*, 293 U. S. 131, 137, "There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention". If the custody or restraint of liberty is terminated without use of the writ, the case is finished. Different considerations are brought into play if custody is ended through the writ itself.

Our rules recognize the beneficent function of the writ, *Bowen* v. *Johnston*, 306 U. S. 19, 26-27; *People* v. *Jen-*

nings, 246 N. Y. 258, 158 N. E. 613[2] by providing that a prisoner to whom the writ has been granted may, pending appeal, be enlarged on a recognizance. Rule 45. The fact that he has been so enlarged does not render the appeal of the custodian moot. *Carr* v. *Zaja*, 283 U. S. 52, 53.[3] In such a case the release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. *St. Pierre* v. *United States*, 319 U. S. 41, 42, and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the *habeas corpus* court did and makes lawful a resumption of the custody. *Knewel* v. *Egan*, 268 U. S. 442, 448; *Haddox* v. *Richardson*, 168 Fed. 635; *James* v. *Amrine*, 157 Kan. 397, 140 P. (2d) 362; *State* v. *Langum*, 135 Minn. 320, 160 N. W. 858.

Second. On the merits the case involves primarily the use by the Selective Service System in New York City of advisory panels on theological classifications. Under the Act the President is authorized to establish "civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act." Section 10 (a) (2), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (a) (2). With

[2] In that case Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, said, "It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal, prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty." 246 N. Y. p. 260.

[3] It appears from the briefs in that case that after the writ had issued in the lower court the petitioner had been discharged, pending appeal, on a recognizance.

exceptions not material here, the President is authorized to delegate to the Director of Selective Service any authority vested in him under the Act. Section 10 (b), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (b). And the Director may redelegate that authority, *Id.* The administration of the system in each State is delegated under the regulations to a state director. Sections 603.11, 603.12, 6 Fed. Reg. 6827. In New York City, however, a city director has been appointed who performs within that area the functions of the state director. Section 603.12–1, 8 Fed. Reg. 3514. The city director supervises the local boards and boards of appeal in New York City. He may require a local board to reopen and consider anew the classification of a registrant. Section 626.2 (b), 9 Fed. Reg. 11619, § 626.2–1, 10 Fed. Reg. 9210. He may appeal to a board of appeal any determination of a local board. Section 627.1, 8 Fed. Reg. 16720, 10 Fed. Reg. 9210. He may require a board of appeal to reconsider its decision, § 627.61, 8 Fed. Reg. 6017, or appeal from it to the President. Section 628.1, 7 Fed. Reg. 10521.

It appears that the city director, in aid of these functions, established theological panels. It was thought desirable to give the selective service personnel the benefit of the advice of those familiar with the educational practices of various religious groups so that Selective Service might exercise a more informed judgment in evaluating claims to classifications in IV–D. Accordingly, theological panels were constituted, one of which consisted of prominent laymen and rabbis of the Jewish faith who gave advisory opinions on those who sought a IV–D classification on the grounds that they were either rabbis or students preparing for the ministry in the Jewish religion. The members of the panel were volunteers, as permitted by the regulations. Section 602.2, 6 Fed. Reg. 6826. And pursuant to the regulations each took the oath of office. Section 602.4 (a), 6 Fed. Reg. 6826.

Samuels registered under the Act in February, 1942. In May and July, 1942, he filed with his local board questionnaires stating that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary preparing for the rabbinate; that since 1940 his regular occupation was that of a clerk; that for the past two years he had been employed by a textile company; and that the job for which he was best fitted was that of a spiritual leader and a teacher of Hebrew or rabbinical duties. The local board was advised by the seminary that Samuels had attended there since he was six years old, that he had finished the eight year elementary course and the four year pre-rabbinical course, that he had been admitted to the rabbinical division in 1937, that he left the school in 1939 to seek employment, that he returned to the evening school in September, 1941, and that he was transferred to the day session in July, 1942, which as later appeared, was a few days before the school closed for the summer.

In August, 1942, the local board classified him IV–D. Section 622.44 (a), 6 Fed. Reg. 6607, 6766. In May, 1944, he was given a physical examination and found acceptable for military service. Thereafter the city director requested that he appear before the theological panel in respect to his claim to a IV–D classification. He appeared before the panel in June, 1944, stating, *inter alia*, that he expected to graduate from the seminary in 1945, that ill health caused him to leave the school in 1939, that between 1940 and 1942 he worked as a clerk, and that he returned to the seminary as a full time student at about the time he filed his selective service questionnaire.

The panel reported that the seminary which Samuels attended was not preparing men exclusively for the rabbinate, that orthodox tradition encouraged advanced study of the subjects in which students for the ministry were trained, and that students ultimately intending to enter

business or a profession or some non-rabbinic activity in the field of religion may be enrolled in the same classes as those preparing for the rabbinate. The panel stated that it therefore seemed essential to determine in each case what the registrant had in mind in pursuing his course of study; that to make that determination the character of the seminary, the sincerity of the registrant's declared purpose, his demeanor, and the impression as to his candor and honesty should be considered. It concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." Its recommendation and the transcript of the hearing before it were sent to the city director who forwarded them to the local board with a request that Samuels' classification be reopened and with the statement that "while the Local Board should give careful consideration to the recommendation of the advisory panel, the responsibility of determining the registrant's classification must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reclassified Samuels I–A in August, 1944. He submitted additional evidence and requested a hearing. One was had in September, 1944 and another in October, 1944. There is no showing that the recommendation of the panel or the transcript of the hearing before it was kept from Samuels. They were not marked confidential in the file. The local board, indeed, allowed Samuels to correct alleged inaccuracies in the transcript. The local board ordered him continued in I–A and on appeal, the board of appeal also classified him as I–A. A few days later Samuels filed additional information with the local board and requested that his classification be reopened. Another hearing was held, Samuels being present. He advised the board that he had appeared of his own volition before a committee representing the Union of Orthodox Rabbis (but not connected with the selective service system) and that the committee concluded he was a student

preparing in good faith for the ministry. What facts that committee may have acted upon do not appear. In any event, the local board denied Samuels' request to reopen the classification by a divided vote; and shortly thereafter he was inducted into the army.

Congress made the decisions of the local boards and of the boards of appeal "final", except as appeals from them may be authorized, § 10 (a) (2), withholding from the courts the customary power of review of administrative action. See *Estep* v. *United States*, 327 U. S. 114.

It is elementary that *habeas corpus* may not be used as a writ of error. *Tisi* v. *Tod*, 264 U. S. 131; *Woolsey* v. *Best*, 299 U. S. 1. The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *Tisi* v. *Tod*, *supra*. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson* v. *Zerbst*, 304 U. S. 458; *Bridges* v. *Wixon*, 326 U. S. 135, 149. But it is not enough to show that the decision was wrong, *Tisi* v. *Tod*, *supra*, or that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner*, 273 U. S. 103. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges* v. *Wixon*, *supra*, p. 156, or that there was no evidence to support the order, *Vajtauer* v. *Commissioner*, *supra*, the inquiry is at an end.

We do not think that the use of the theological panel *per se* infected the whole administrative proceeding and rendered it so unfair as to be nugatory. The task of the local boards in evaluating claims to exemption is almost certain to raise perplexing problems, especially in large

centers where the status and activities of registrants are not so well known in the community. The local boards will frequently have to make inquiries on their own. And when it comes to exemptions claimed under § 5 (d), the variety of religious faiths and the differing educational practices of the churches or of sects within one faith may create difficult questions for the boards.

We agree with the court in *United States* v. *Hearn*, *supra*, p. 188, that advice from well-informed members of the faith in question may "both help and speed just classification". Congress wrote into the Act a comparable procedure for the handling of claims for exemption by conscientious objectors. Where such claims are denied by the local board and appealed, they are referred to the Department of Justice for a hearing and an advisory report. Section 5 (g). But the fact that there is no specific statutory provision for the creation of theological panels does not make their use improper. Wise administration may call for the expert advice which they alone can offer. And we see no difference in principle if they are formally constituted and regularly used in lieu of inquiry to members of the particular faith as individual cases arise. The administrative function entrusted to the Selective Service is an enormous one. The Act contemplates an administrative organization highly decentralized so as to operate effectively at the local level. More than the director, local boards, and boards of appeal were authorized. For § 10 (a) (2), as we have noted, authorized the creation of "other agencies" as well. A theological advisory panel, serving solely in an advisory capacity, would seem to be included in that category. The information received by the board from the panel, like information from any other source, must be put in writing in the file so that the registrant may examine it, explain or

correct it, or deny it.[4] There is, moreover, no confidential information which can be kept from the registrant under the regulations.[5] With those safeguards a truly expert panel might serve a most useful function without the administrative process being corrupted by any unfair procedure.

Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, — F. 2d —, decided October 31, 1946. But it has not been shown that such a condition obtained here.

The court in *United States* v. *Cain*, *supra*, p. 341, held that though the propriety of the use of a theological panel be assumed, it must be limited by two conditions: the names of the members of the panel must be disclosed to the registrant so that he may be in a position to challenge it; the advice or answers which it gives must be limited to ecclesiastical questions.

In the statement which the panel filed in this case the names are not disclosed. But we do not think that fact rendered the administrative proceedings invalid *per se*. This is not a case of a registrant being passed upon by a secret group. He appeared before them, saw them face to face, and indeed recognized one of them. There is no showing that Samuels tried to ascertain who the panel members were, either at the time or subsequently, and was denied the information. Though we assume that the regulations require the file to disclose the names and affiliations of the panel members, the mere absence of a formal

[4] The regulations provide that in classifying a registrant, "Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." Section 623.2, 9 Fed. Reg. 437, 10 Fed. Reg. 8541.

[5] See § 605.32 (a), 9 Fed. Reg. 9190.

disclosure is not, without more, so grave an omission as to undermine the whole administrative proceeding.

The question is not whether the allegations of the petition are sufficient to justify the grant of the writ or the issuance of a rule to show cause, so that the facts can be ascertained in accord with the procedure outlined in *Walker* v. *Johnston*, 312 U. S. 275. In this case there was a return to the writ, a full hearing was had, and all evidence offered was received. Samuels had the burden of showing that he was unlawfully detained. *Walker* v. *Johnston*, *supra*. Not every procedural error, but only those so flagrant as to result in an unfair hearing render the proceedings vulnerable in a collateral attack. *Tisi* v. *Tod*, *supra*, p. 133; *Bridges* v. *Wixon*, *supra*, pp. 152–156. On the case Samuels has made out, the most that has been shown is that the use of the theological panel might result in a hearing so unfair as to deprive the administrative proceedings of vitality. Samuels has failed to show that in his case it had that effect. He has therefore failed to sustain the burden of proof which was on him.

Secrecy and anonymity are not congenial to our traditions of procedure, nor in keeping with the regulations under this Act. But as we have said, the range of inquiry in a *habeas corpus* proceeding is limited. We are not sitting in review of action of federal agencies over which we have the power of supervision. Cf. *McNabb* v. *United States*, 318 U. S. 332. The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been so corrupted as to have made it unfair. Samuels points to possibilities of abuse. But he fails to establish prejudice in his case.

If, as was held in *United States* v. *Cain*, *supra*, the panel must be restricted to answering ecclesiastical questions, Samuels should prevail. For the panel in question not only gave the board information concerning the seminary which Samuels attended but also rendered an advisory opinion on the *bona fides* of his claim. The argument for restricting the panel to ecclesiastical questions is based on the thought that it is only on such subjects that the board needs specialized information, while if the board relies on a general advisory opinion of the panel, it is devolving its administrative responsibility. *See United States* v. *Cain*, *supra*, pp. 341–342.

It is plain that the local boards and the boards of appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10 (a) (2). But no such case is made out in this record. The city director submitted the panel's report with the admonition that it was advisory only and that it was the board's responsibility to make the classification. The recommendation of the panel was followed. But Samuels was subsequently given not only one but two hearings before the local board and a hearing before the board of appeal. There is no indication that either board relied solely on the panel's report or considered itself bound by it. In fact both boards received additional evidence submitted by Samuels and considered it. The record does not bear out the suggestion that either board was a rubber stamp for the panel.

Nor do we think that the range of inquiry and recommendation of the panel was too broad. If a panel is truly expert in the field, its expertness is not necessarily limited to knowledge of the theological schools, the course of training, and the educational practices and traditions. Its acquaintance with the ministry of that faith and with the norms of the profession may well give it special insight into the claims of those seeking exemption. To draw the

line at questions technically ecclesiastical is to make a distinction which may be wholly arbitrary in terms of the panel's expertness. A panel might act on irrelevancies; it might usurp the functions of a board. We discover nothing of the kind here. The fact that the board follows the advice of the panel does not necessarily mean that it functions in a subservient way. The fact is that the local board and the board of appeal gave Samuels further hearings and received and considered all evidence submitted. We find no procedural error of such magnitude as to warrant an uprooting of the entire administrative proceeding in this collateral attack upon it.

Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the two year interruption in his education, his return to the day session of the seminary in the month when his selective service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption.

Reversed.